NO. 20917

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL ALLAN McCOWAN,

Defendant-Appellant.

Appeal from the United States District Court,
Southern District of California, Central
Division, Honorable Charles H. Carr, Judge.

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# APPELLANT'S OPENING BRIEF

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# STATEMENT OF PLEADINGS
# AND
# FACTS DISCLOSING JURISDICTION

The District Court had jurisdiction under 18 U.S.C. 3231, this being a proceeding on an indictment filed in the United States District Court, Southern District of California, under that court's number 35009.[1]

COUNT ONE charged: "On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL ALLAN McCOWAN, by fraud and deception obtained from the Van Nuys, California Main Post Office a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland."

COUNT TWO charged: "On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL A. McCOWAN, opened a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland, with design to obstruct the correspondence of and before being delivered to the addressee, which said package theretofore had been in the Van Nuys, California Main Post Office."

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[1] The record, pursuant to rules of this Court, is not printed. It consists of four volumes, including the transcripts

The defendant had been previously charged in Case No. 34508 (United States District Court for the Southern District of California, Central Division), and upon disagreement of the jury (they were unable to reach a verdict) the matter was declared a mistrial and set for further trial. Case No. 34508 was eventually dismissed (See: Official Reporter's Transcript p. 693).

The instant case proceeded to trial and at the conclusion of the testimony of the Government's witnesses a motion for judgment of acquittal was made and was by the court denied (Reporter's Transcript of Proceedings [hereinafter referred to as R.T.] p. 178). At the completion of the trial of this matter another motion for judgment of acquittal was made (R.T. p. 420). Under Rule 29, the court reserved a ruling on the motion. Subsequently, at the time of pronouncement of judgment, the motion for judgment of acquittal was denied and judgment pronounced.

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[1 cont'd] labeled "Reporter's Transcript of Proceedings," and contains all of the testimony taken at the trial and also the proceedings subsequent thereto at the time of hearing motions for judgment of acquittal and pronouncement of judgment; also the official record from the District Clerk, which includes a copy of the indictment, a motion to dismiss and various minutes relating to the trial.

The case was tried before the Honorable Charles H. Carr, United States District Judge for the Southern District of California, sitting at Los Angeles, California, with a jury.

In this case, at the time of judgment, testimony was taken in the nature of pre-sentence testimony and is to be found in the Reporter's Transcript of those proceedings at pages 572, 616 and 644. Judgment is shown at page 688. The defendant-appellant was sentenced to the penitentiary despite a provision that he be committed for study. The defendant was released upon a motion for bail pending appeal (R.T. p. 688). As has been stated, Case No. 34508 was dismissed (R.T. p. 693).

Prior to trial, a motion to dismiss the indictment was made and was by the court denied. This motion was based upon the ground that after a trial by jury in which the jury disagreed and a mistrial was declared, a superseding indictment was returned by the Grand Jury and a substantial change was made in one of the counts of the indictment. The superseding indictment in this case presently on appeal was in the following language: (Count Two - Case No. 35009) That the defendant "opened a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland, with design to obstruct the correspondence of and before being delivered to the addressee, which said package theretofore had been in the Van Nuys, California Main Post Office." Count Two in the original indictment (No. 34508)

alleged that the defendant "had in his possession the contents of a package." The superseding indictment was altered by adopting different language, a different code section and a different sense.

A notice of appeal was timely filed and is found in the Clerk's Transcript.

A designation of record on appeal was duly filed and is found in the Clerk's Transcript.

The judgment is found in the Clerk's Transcript.

## JURISDICTION

This Court has jurisdiction of the appeal under 28 U.S.C. 1291, 1294(1) and Rule 37a of Federal Rules of Criminal Procedure.

## STATUTES INVOLVED

The defendant-appellant is being prosecuted under sections 1702 and 1708 of Title 18, United States Code, which provide in pertinent part:

18 U.S.C. 1702:

> "Whoever takes any letter, postal card, or package out of any post office

> or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

<u>18 U.S.C. 1708</u>:

> "Whoever steals, takes . . . or by fraud or deception obtains . . . from or out of any mail, post office, or station thereof . . . any letter, postal card, package . . . shall be fined not more than $2,000 or imprisoned not more than five years, or both."

# SPECIFICATION OF ERROR

1. The court erred in denying the motions for judgment of acquittal. The evidence was not sufficient to sustain the trial judgment on both counts or either count.

Ancillary to this, and controlling, we respectfully urge that the court had no jurisdiction to try this case. McCowan was a sender, and when the package was returned to him the postal authorities and the United States District Court lost jurisdiction to try McCowan.

2. The United States Attorney was guilty of misconduct in the course of cross-examination of a character witness of the defendant-appellant - such as could not be cured by an instruction to disregard the same, as given by the court.

3. Incidents which denied defendant-appellant a fair trial, as guaranteed by the Constitution:

A. The new indictment after the mistrial, switching the allegations and doing so to encompass the testimony developed in the first trial. (See Motion to Dismiss - Clerk's Transcript.)

B. The question put to one character witness

and sought to be presented to the numerous character witnesses.

C. The questions put to the defendant-appellant about his legal education.

D. The questions about defendant-appellant's intimacy with the government's female witness.

## SUMMARY OF ARGUMENT

1. We contend that the evidence was not sufficient to show the crime charged. McCowan was the sender, and the facts indicate it. The United States District Court was without jurisdiction to try the case (See *United States v. Bullington*, 170 Fed. Rptr. 121). The court permitted all of the details of what happened after the delivery to McCowan. If a crime was committed, the State had jurisdiction.

2. A character witness was asked on cross-examination if he had "heard that Mr. McCowan passed worthless checks in the sum of $12,568.00, and that as a result of this it was a major factor in a man losing his business?" This was gross misconduct and could not be cured by an instruction (*Krulewitch v. United States*, 336 U.S. 440).

This was misconduct (*Vierick v. United States*, 318 U.S. 236, *Berger v. United States*, 295 U.S. 78).

3. We contend that the following incidents denied defendant-appellant McCowan a fair trial.

A. The superseding indictment charged a new offense - after a mistrial had been declared. The government then tailored the indictment to attempt to cover defendant-appellant's testimony.

B. The question put to the character witness about defendant-appellant passing bad checks and ruining a man's business, and sought to be put to other witnesses.

C. Questions put to the defendant-appellant about his education as a lawyer. This put the appellant, a policeman, in a position where the jury might well have required a standard of conduct from him different from some other person.

D. The questions about defendant-appellant's intimate relations with the government's female witness. This violated the rule as laid down in *Berger v. United States*, *supra*, 295 U.S. 78.

## STATEMENT OF FACTS

FOR THE PLAINTIFF-APPELLEE:

JEAN ORTIZ stated that she knew the defendant. She had met him in September, 1964, at the Woodley Inn. At that time her sister Joan Ansel was with her. She saw the defendant from time to time thereafter. (R.T. [hereinafter in this Statement of Facts the page number only will be shown to indicate the location in said transcript] p. 25-27.) At the time of meeting the defendant she had been living with her sister Joan. Her sister left California. Prior to leaving, her sister left three diamond rings (Exhibits 1, 2 and 3) to be held for her. (27) She identified the exhibits. After her sister left California, she received a telephone message from her. Mr. McCowan brought the rings to her house and they wrapped them in a package (Exhibit 4). That was the box they sent the rings in. They went to the Police Station to get some string for the package; they were in her car. Mr. McCowan went into the Police Station to get his check and pick up some tape and string. He taped up the package and put string around it. She gave Mr. McCowan the address to which the package was to be sent. She saw him write the address. (30-32) He wrote her address on one side and the address of her sister. He put his name plus her post office

box on the package. Her post office box was No. 2754; it was used by her sister and herself. They drove to a branch post office and Mr. McCowan said it would be better to go to the main office. (32-33) She handed the package to the postal clerk and it was mailed. (34-35) She and McCowan then drove back to her place. They came out of the post office building together. After mailing the package on October 21st, she later talked to her sister. She later made inquiry at the post office. The information on Exhibit 5 she gave to the postal official about November 17th. She had a conversation with Mr. McCowan after the package had been mailed and before she went to the post office, and he said that the package had probably been lost in the mail. (39-40) She told Mr. McCowan that, because her sister had not received them, she had sent a tracer out for the rings. (40-41) He made no statement. (41) After Mr. McCowan was arrested she had a conversation with him, just Mr. McCowan and herself were present. He said that the only reason he took the rings was to sell them to get money; that he was going to give her the money. (42) Mr. McCowan told her he had never done anything like that before, and she told him that if he would give the rings back she would not press charges. (42) She had had another conversation with Mr. McCowan; this had been in the presence of Jerry Vaccaro.

At that time McCowan asked her if she would plead the Fifth Amendment and not say anything in court, and she told him she could not do that, that it would make her look guilty. (43) Mr. Vaccaro said that she could forget a lot of things. (44) She did not remember whether Mr. McCowan said anything about forgetting things. (44)

(Exhibits 1 to 5 were admitted in evidence.) (45)

On cross-examination she testified that when she first met Mr. McCowan she learned that he was a Los Angeles policeman. At this time, in her presence, her sister told Mr. McCowan that her husband was in jail in Maryland and she wanted to locate exactly where he was and what had happened to him. (47) Mr. McCowan had replied that he would try to find out what he could about her sister's husband. Later she and her sister and McCowan went to a house on Royal Oak; there they had a conversation with Mr. McCowan about furs, diamond rings, jewelry and guns. Certain jewelry, diamonds, fur coats and guns were taken to the house on Royal Oak. (49-50) Later she had a conversation with Mr. McCowan about removing the articles to a cabin in the mountains for safekeeping. (50) She knew that her sister had given McCowan some guns, some rifles, and a surgical kit; that her sister had told McCowan that the surgical kit had been used by her to remove a bullet

from her husband's body. (50) After her sister went East she talked with her from time to time. She denied ever telling Mr. Jerry Vaccaro that she was desperate for money. She knew Mr. Vaccaro. She had visited Mr. Vaccaro at his house. She denied that she had a conversation with Mr. McCowan in which Mr. McCowan told her that he did not want to return the guns to her, that he needed the guns in his forthcoming trial, and that he felt the guns would be used in an attempted jail break. (53) She denied telling McCowan that she thought that he had given information to the police which had resulted in the arrest of her husband. She denied telling Mr. McCowan that she had talked long distance with her sister Joan and that her sister had told her that she had information that McCowan had given information to the police which had resulted in the arrest of her husband. She testified that her husband had been tried for robbery in this community and convicted and went to prison. (58) She denied telling Mr. Vaccaro that she thought Mr. McCowan had something to do with it. She denied accusing McCowan of having had something to do with it. (59) Her husband was arrested about October 26, 1964. (59) She identified a photograph (Exhibit A) as a fair representation of a surgical kit and some of the small guns and rifles her sister Joan had.

(Exhibit A was received in evidence.)
(62)

She had sold one of the fur coats her sister had left with her. Mr. McCowan had had possession of the coat for safekeeping. Mr. McCowan gave her the coat upon her request. (63) She sold the fur coat that McCowan gave her; she sold it because she needed the money. She did not remember whether McCowan gave her the diamond rings at that time or not. (66) She denied ever telling Jim Malucci and Jerry Vaccaro that she and her sister Joan had dressed as men and had performed robberies. (67) She then stated that Jerry Vaccaro had asker her for stories and she had told him that she and her sister had performed robberies. (68) She made up stories when he kept questioning her. (68) She denied telling Mr. Vaccaro that her sister had not given her her share of the robberies. (69-70) She had been friendly and affectionate with Mr. Vaccaro. (70) When she went to the post office, she knew that Mr. McCowan's name was on the package as the sender. (72)

EDWARD TULLY testified he was a postal clerk at the Van Nuys Post Office, Main Office. He was so engaged in October of 1964. Mr. McCowan came to the window at the post office; McCowan was in a police uniform and identified himself as a police officer. McCowan asked him if it was possible to withdraw a package from the post office, that

he was working on a case, that he would be in the following day with a young lady and they were to mail a package. (90-91) He referred McCowan to Garth Gledhill, the assistant postmaster, stating that it was possible. On the following day, October 21, McCowan came in with a young lady (Jean Ortiz); they approached his window. The young lady handed him a package and said she wanted it mailed. He could not say who handed him the postage. McCowan was standing a little behind her and just to her right. He could not say whether he stepped up and gave him the package or she did -- or the money; he did not recall. (92) Mr. Gledhill came into the post office later and he handed Mr. Gledhill the package that had been mailed by the defendant and Miss Ortiz. (92-93)

On cross-examination he said that he had probably seen thousands of people since that event. At the previous trial he had stated that he was not sure who gave him the package; he was not positive. (94-95)

GARTH GLEDHILL testified that he was assistant postmaster at the Van Nuys Post Office. He recognized the defendant McCowan. On October 20, 1964, he saw McCowan; McCowan had been dressed in a uniform and had the badge of a Los Angeles policeman. McCowan wanted to know if there

was a procedure by which a package could be withdrawn from the post office. McCowan stated that he was working with the Police Department on an investigation involving a couple of girls; McCowan assumed they were going to mail a package and wanted to withdraw the package for further investigation. (98-99) The following day he talked with Mr. McCowan on the phone and Mr. McCowan told him the package had just been mailed and that he wanted to withdraw it; McCowan gave him the information, a street address in Granada Hills and his (McCowan's) name as the sender and Joan Ansel's name as the addressee at the Colonial Manor Motel in Rockville, New Jersey. He placed part of this information on a form (Exhibit 6 - Form 1509, a sender's application for recall of mail). (100-101) He put a change on the form after picking up the package. He saw the defendant in about 30 minutes; the defendant came to his office. He asked the defendant about the street address originally given; this was not what was entered on the package. The defendant told him he had placed the post office address of Jean Ortiz on the package in error. The defendant signed application form No. 1509. (102-103) He gave the package to the defendant.

He stated on cross-examination that he had filled in the application himself; that he had written thereon "wrong contents." (104) McCowan told him that he was the sender

and McCowan's name appeared on the package and so he returned the package to McCowan. (105)

(Exhibit 6 was received in evidence.)

JOHN BRAYMAN testified he was a jeweler with M. Weinstein, Inc. He had a conversation with Mr. McCowan about diamonds; McCowan had stated that he had received the diamonds from relatives back East and wanted an appraisal. (109-110) Exhibits 1, 2 and 3 were shown to the witness. He had examined these rings and had made an appraisal. (111-112) The defendant had come back about three hours later and picked up the appraisal (Exhibit 7). Two copies of the appraisal were given to the defendant. (112-113)

(Exhibit 7 was received in evidence.)

THE DEPOSITION OF JOHN BROOKS RUNYON WAS READ INTO THE RECORD: He knew Mr. McCowan; had met him through an acquaintance, John O'Grady of the Los Angeles Police Department. (116-117) He had had a conversation with McCowan in 1964. McCowan said he had some jewelry and wanted to know if he would be interested in buying it. McCowan said he owned the jewelry or he had acquired the jewelry in a real-estate deal. (118-119) He was to consider buying the jewelry or possibly selling it. (120) He turned the rings over to

Mr. Matheny. (123) He later received $1100 from Mr. Matheny for the sale of the large ring - the two-carat lady's ring. (124) He gave the money to McCowan. (125) On cross-examination he testified that the defendant was referred to him by John O'Grady, a sergeant in the Los Angeles Police Department. (127-128) He believed that Mr. McCowan had said they could take their time, that there was no hurry for a quick sale, that they could take their time and get a better price. (130) There was an advertisement placed for the sale of the rings. (131)

CHARLES MATHENY testified that he was a jeweler. He first saw Exhibit 1 through 4 about Christmas, 1964, at Brooks Runyon's home. (139-140) He was to appraise the rings. The rings (Exhibits 1 - 3) were contained in Exhibit 4 (a black box). (140-141) He sold the large two-carat ring (Exhibit 1) to a Mr. Tanzey. (142)

WILLIAM H. TANZEY testified that he bought a ring from Mr. Matheny, that he paid him $1100 for it before Christmas of 1964. He identified Exhibit 1. He gave the ring to his wife and later had to take it away from her. He later gave it to Postal Inspector Jensen. (145-148)

On cross-examination he stated that he later was paid

the $1100. (148)

STANLEY H. JENSEN testified that he was a postal inspector. He first saw Exhibit 1 in the office of Attorney Guziel at Canoga Park. (149-150) Exhibit 1 came into his possession at that time. Brooks Runyon gave him Exhibits 2, 3 and 4 in January of 1965. (151) The box had the impression of writing upon it, the address of Joan Ansel, Colonial Manor Motel, Rockville, Maryland. He could also see the impression of Box 2764 Van Nuys in the corner. He saw an impression also that was not legible. (151-152) He knew McCowan; he first met McCowan on January 6, 1965, in the Van Nuys Police Department. He had a conversation with McCowan at that time and place; he told McCowan he was a postal inspector, showed him his certificate, advised McCowan of his constitutional rights, that he did not have to make a statement and that any statement he made could be used against him and that he had the right to the services of an attorney at any time. McCowan told him that earlier in 1964, in the late summer, he had met Jean Ortiz at a small restaurant and bar in Van Nuys in which he had a small ownership; that he had introduced himself to her and she was a customer; that he subsequently informed her that he was a police officer with the Los Angeles Police. McCowan

had mentioned to him that he had been instrumental in the transaction of the sale of this bar from one person to another, his friends, and as a result he had received a 2% interest. (153-154) (The court instructed the jury to disregard the last statement. 154-155) McCowan had stated that certain property, including guns, furs, valuable property, had been transferred to him for safekeeping by Joan Ansel, the sister of Jean Ortiz; that Joan Ansel's husband had been arrested in the East and that she felt she could trust him as a policeman. McCowan told him that he wanted to run the guns down to see if they had been used in robberies; that he had gone to Detectives Long and Moulder who were in the robbery detail and told them he had become friendly with the two girls and that he thought they were connected with or married to men who engaged in criminal activities and that he thought he might get further information from these girls which would be helpful in solving robberies in the Valley. McCowan told him that he had been told by one of the two detectives, he thought it was Mr. Long, that he should not retain this property once he had gotten the serial numbers and the various information; that he should get the stuff back to the girls. He told Mr. McCowan that the purpose in interviewing him was to investigate a parcel that had been mailed by Jean Ortiz

which was reported lost in the mails by the addressee, Joan Ansel, and by the sender, Jean Ortiz. Mrs. Ortiz had told him that Mr. McCowan had gone to the post office at the time of mailing and, therefore, they felt that he (McCowan) could add materially to the facts. (156-157) McCowan told him that he knew all about the package, that prior to mailing he had gone to Mr. Gledhill and had advised Gledhill that he was a police officer, that he would mail a package in the company of a girl and that he would withdraw the package shortly after the mailing. McCowan told him that he withdrew the package and took it to the police station where it was opened. (157-158) McCowan told him that when the package was opened they found it contained identification cards. McCowan told him that after finding the box had no narcotics in it, he was told by Long and Moulder to get this package back in the mail. McCowan told him that the box contained identifications, nothing more. McCowan told him that he had put it back in the mail. Later McCowan said he might still have the package; that he believed he had put it in a coat pocket. Later in the interview McCowan said, "Well, I have to be honest with you guys, I lied to you. Actually I threw the package away." (157-158) McCowan told him that he had thrown the package away as he "didn't want these guys to have this -- these people to get back these phony IDs . . . I

thought they shouldn't have them, so I just threw it away." (158-159) He told McCowan, "Well, you lied to us about the prior disposition, first you told us you mailed it and then you told us that you had it in a coat pocket at home, and now you tell us that you threw it away." (159) McCowan said that he did not know anything about the three diamond rings. (159-160)

On cross-examination he testified that he had filed a report that he had interviewed McCowan and a brief summary of the gist of the conversation. He was reluctant to produce a copy of his report but was ordered by the court to do so. (162-163) He stated that at the time he talked with Mr. McCowan he had no warrant for McCowan's arrest. (166) During the course of his conversation with McCowan, McCowan had said that he wanted to talk to an attorney; they had encouraged McCowan to do so. (167) McCowan had stated that he had become acquainted with Jean Ortiz and Joan Ansel and that he had reported this to Mr. Long, Sergeant of Detectives; that he (McCowan) had learned that Ansel's true name was Christensen and that he was investigating the complicity or participation of these parties in robberies. (167-168) McCowan told him that he had attempted to ingratiate himself with these girls in order that he might get information; that from time to time he had kept in touch with Sgt. Long; that he thought these

people were attempting to liberate Ansel from jail. (168-169) McCowan told him that he was investigating these people; that he did not want to see them get the identification cards; that he had come across a number of guns that these people had, hand guns and rifles. (169-170) His report says, "He consistently denies theft of the rings." McCowan had denied that he had ever taken anything from these girls by theft and had stated that he was willing to submit to any test; that he was doing this as a police officer, endeavoring to solve a crime if he could. (172) McCowan told him that he had reported from time to time to Sgt. Long at the Van Nuys Police Department.

J. P. KEOWN testified that he was a postal inspector and had worked on this case with Inspector Jensen. (176)

THE GOVERNMENT RESTED.

Motion for judgment of acquittal was made. (178) *United States v. Bullington,* 170 Fed. 121, was cited to the court in support of the defendant's contention that the evidence was not sufficient to sustain the charge. Motion was denied. (182)

FOR THE DEFENDANT-APPELLANT:

MICHAEL McCOWAN testified that he had been a police officer for the City of Los Angeles for about 10 years; that he graduated from law school in January of 1964; and that he had a family. At the Woodley Inn in 1964 he had met Jean Ortiz and Joan Ansel or Joan Christensen; at the time he was attempting to help a friend, Jerry Vaccaro, who owned the Woodley Inn. (190-191) Joan Ansel, the taller of the two girls, asked him if any tall fellows came in. He told her he could introduce her to some nice, tall policemen, and the girl said, "If you knew who I was you wouldn't have made that remark." He thought about it and said, "What is the matter, don't you like policemen?" She said, "Are you a policeman?" And he said, "Yes, I am." She then said, "My husband is Kenneth Malcolm Christensen, he was just arrested back East. He was one of the ten most wanted men of the FBI." He said that he had not heard of him. (192-193) She asked him if he could find out anything about her husband and he said he possibly could. She wanted to find out where her husband was, that he had been picked up for robbery and was involved in robberies in Maryland. Jean Ortiz was sitting there within hearing distance. He talked to them a few days later. In the meantime he had relayed

this information to Sgt. Long of the robbery detail, Detective Bureau. These girls were driving a 1964 white Pontiac and Sgt. Long said to find out what he could, that they might have guns in the locker panels. He called the bar and told the bartender, Jim Loreno, to call him if the girls came in. Four or five days later he received a call from the bartender that the girls were there. He had the bartender check to see if the car was outside. He then talked with the taller sister on the phone. He made arrangements to meet her the following day. After reporting to the robbery detectives, he met her; he reported to Sgt. Long. (193-196) He met Joan Ansel/Christensen; at that time she was driving a '65 Pontiac; she went to Maywood with him. She told him that her husband, Christensen, had been involved in robberies; that they were married in April of that year and had gone on a trip throughout the country and she drove the get-away car in robberies for her husband, he had pulled a lot of jobs and had used a lot of aliases. (197-198) She told him that she and her husband had gone to a motel in Maryland and had gone out for dinner to case the place that they were going to rob the next day; that the next day they went back to the place and when he came out people were chasing him and she heard police sirens; that she drove toward him and he waved her on; that she went to the motel, picked up the fur coats and diamond rings and guns

and drove directly to California. (198-199) She told him that she had stored some of the stuff and given some of the guns to a girl in Hollywood. She took him to the vicinity of this girl's apartment; she left the car and later returned with another woman; over the back wall they handed him five guns, rifles in their carrying cases. He put these in the back of the Pontiac. They then drove to her apartment. He did not go up with her. She brought down two fur coats and some diamond rings. They then drove to 15627 Royal Oak Road in Sherman Oaks, an empty house that he was caring for. (200-201) They took the fur coats, diamond rings and the rifles into the house. The diamond rings were the same ones as those in court. (202) He identified Exhibit A, a photograph of the rifles and guns which had been taken into the house. He met her at the same house the next day. She arrived with Joan Ortiz. At that time she had a bunch of clothes which she said were her husband's, and a medical kit which she said she had used to remove a bullet from her husband's leg. (204) In the left-hand corner of Exhibit A was the kit. (205) After first going to the house he had been afraid the girl might remove the things, so he had removed them; he and his wife removed them to his home. He reported to Sgt. Long that he had seen these guns and the surgical kit. (206-207) After the hand guns, medical kit,

etc. had been placed in the house on Royal Oak, he and his father had returned and removed them to his home. The girls asked him where the other stuff was, and he told them he had already taken it to the cabin. His father had helped him move the things and when he arrived home his father, his mother and his wife were all there; they saw all the objects. (208-209) After removing this material he had talked one night with the girls and Joan Ansel said she was going to Baltimore, that she and her husband had a prearranged plan and she intended to help him break out of jail. (210) She said she might need the guns to break her husband out; that she might want him to give back the stuff to her sister. He did not see Joan Ansel again. He later saw Jean Ortiz. Joan, as far as he knew, went to Baltimore. (210) He checked with the FBI about the guns and the furs. (211) Later he met Jean Ortiz at her apartment and she said her sister wanted to get the fur coats and diamond rings back; that she and her sister had never gotten along; that she was afraid of her sister Joan and that Joan was a vicious person. (211) Jean Ortiz wanted the diamonds and the fur coats back and the guns. He led her to believe the guns were still hot. Some time later she said her sister wanted the diamonds and the fur coats; she said that she was going to sell the fur coats and send the diamonds back to

her sister. In the meantime her husband had been picked up for robbery and she asked him if he had turned her husband in. He told her no, "I am involved in this thing as much as you." He said this so that she would not get suspicious. (212-215) He and Jean Ortiz prepared two packages; the diamonds were placed in a package and there was a second package. He proceeded to wrap the package with the diamond rings in it and addressed it to her sister. When he went to wrap the other package, he shook it and asked what was in it, and she said, "Now you are talking like a cop." They did not have enough wrapping material, so they did not go to the post office that evening. He had gone to the post office to check about recovering a package. On the 21st of October she told him that she had talked with her sister and had told her sister that she was desperate for money and was going to sell the fur coats and the diamond rings, and her sister had said, "Go ahead and sell them out there. I am in need of money too. Take what money you need for your husband's defense and send the rest to me." Jean asked him if he could sell the diamonds and he said he would try, that he had never sold any. She then gave him the diamonds. (218-219) He had told the man at the post office that he was a policeman and engaged in an investigation, that there was going to be a package mailed and that he did not know the

contents of the box but that it was about the size of a "hyp" kit and he thought it might possibly contain narcotics; that he had worked his way in with two females; and that he would like to retrieve the package from the mails. The postal employee told him if his name was on it as sender he would be able to retrieve it if he could identify it, sign a piece of paper stating that he had received it from the Service, so that the postal inspectors would know where the package went. (220) They did not have enough packaging material, so he and Jean Ortiz drove to the Van Nuys Police Station where he worked; he had done this for three reasons, (1) he wanted to get additional packaging material, (2) it was near the main post office, and (3) he wanted to check and see if any of the detectives were in the squad room, so that he could advise them how things were going. (220) None of the detectives to whom he had reported were there. He got the additional packaging material from the Detective Bureau. He completed the wrapping of the package in the car, Jean Ortiz's car. His name was put on as the sender. The return address was the post office box belonging, he believed, to Joan Ansel in Van Nuys. The package was presented to the clerk at the post office; he and Jean were standing directly together. He did not recall who actually handed the package in. He gave Jean the money for the postage. (221-222) The

diamonds were not in that package; the diamonds were in his pocket. He later returned to the post office and obtained the package from Mr. Gledhill. He signed a document there. Mr. Gledhill filled in a portion of the document. (223) He did not in any manner actually attempt to take the property with the intent to appropriate it to his own use. (223-224) He took the package to the police station and kept the package in his locker. The following morning he showed Sgt. Long and his partner -- he believed it was Sgt. Miller -- the package. Detectives were coming and going. The package was opened and they found inside a driver's license in the name of Michael Ancell (Ansel) or Michael Yosef Ancell (Ansel), which was one of the aliases that Joan Ansel's husband had used. There was also an FCC pilot's license and several other pieces of identification. Sgt. Long gave him back the package and said, "I think the best thing for you, so that they will not get suspicious of you, would be to place it back in the mail." (225-226) He did not do this. He felt that if they got the identification they would use it in connection with the jail break. With reference to the diamonds, he checked around the jail to see if anybody was familiar with selling diamonds. Sgt. O'Grady said he was. He showed O'Grady the diamonds and O'Grady told him to go see Brooks Runyon. (227-228) The

diamonds were sold and Brooks Runyon gave him the money, $1100. (228-229) In connection with this conversation with Mr. Jensen, he did first deny any knowledge of the diamonds. He said he prefaced his statement, when he talked about the diamonds, by telling him that he wanted to talk to his attorney. He did talk to an attorney later. (230) He told Jensen a misstatement because he was a little bit frightened at first and taken aback that they did not believe his story. He asked them if they would give him a lie detector test and they refused. He asked to be confronted with the girl and they refused that. Later he talked with Jean Ortiz at the Woodley Inn over the telephone. He and Jerry Vaccaro had arranged to have her there. Also there was present Ira Reiner. In the conversation Jean asked him to give the guns back and he told her that he was not going to give the guns back because she knew they were going to be used in a jail break and he could not in good conscience give them back. She said, "So what?" (233) He never at any time asked Jean Ortiz to take the Fifth Amendment. He never told her to color her testimony in any respect. He told her to tell the truth. (233-234)

The guns which he took were all operable. (268) The guns were removed from the Royal Oak address to his home;

[illegible]

[illegible]

[illegible]

one night he and his wife took some and the next night he and his father took some to his home. (268) He first took down all of the serial number. He gave Sgt. Long the serial numbers; he either informed him or assumed that he knew that he had them in his possession. (268) He was asked if he knew that it was a violation of police regulations to keep property seized in his personal custody, and he stated that he did not know there was such a regulation. (270) He stated that when the packages were wrapped he put his name on both packages. (275) The package containing the diamond rings (Exhibit 4) was in his pocket when he went to the post office. (278) The package containing the diamond rings was not to be mailed. Before he withdrew the package, he told either Sgt. Long or Moulder about removing the package from the mail. (278) He denied taking the diamond rings from the mail, making a switch and taking another package with the identification to the police department for an alibi. (281) He said he talked to Jensen, the postal inspector, about the package that was in the mail; he thought that was what the interview was about. (283) The package he was concerned with was the one he thought contained narcotics and that was the one he wanted to get from the mails. (284) The only thing he was interested in at the time of getting the package was to find out what the contents were. (285) Sgt. Long suggested

he put the package back in the mail for his own security, so the girls would not get on to him. He had information there was going to be a jail break; he gave the police information about it. He thought if there was going to be a jail break and they did not have the ID card they could not use it. (287) There was only one package mailed. (287) The package with the diamonds was never mailed; it was wrapped and marked because it was to be mailed. It was wrapped and marked two days before the diamonds were to be sent; the package was not mailed that night because it was late and they were to get insurance on the diamonds, because they were valuable. (287) Jean Ortiz had the package. He got the package the day that they were to mail the package that contained the identification. Jean Ortiz said she had been in touch with her sister and her sister had said that it was okay to sell the fur coats and the diamond rings and use the money that she got from the sale for her own purpose and send the rest on for her because she needed money also. (289) At the time he went to the post office he had both packages with him. (289) He opened the package to get the diamonds and he sold them; Jean Ortiz authorized him to sell them. (290) He was asked if during all of this time he was not making love to Jean Ortiz and, over objection, answered, "Yes." After selling the diamonds he took the

money home and put it in his desk drawer. (293) $1100. He did not tell Sgt. Long; he was not working at that time after he had received the money. (293) He did not give the money to Jean Ortiz because he had moved and he did not have her address. He was off duty, not working, his wife left home to go East - her mother was dying, and he remained home with the children.

IRA REINER testified he was an attorney employed by the City of Los Angeles in the City Attorney's office, Criminal Division. (297) He had lived in Los Angeles all of his life. He and Mr. McCowan were friends. He had talked to Jean Ortiz at the Woodley Inn about two weeks prior to the former trial. He was waiting for a tall blond to come in and approach Jerry Vaccaro. A tall blond walked in and approached Vaccaro. Vaccaro picked up the phone and made a call. After Vaccaro finished dialing he picked up the phone and listened. He heard Mike McCowan. McCowan said, "Hello, Jerry," and Jerry Vaccaro said, "This is Jerry." Vaccaro then turned to the tall blond and said, "I have someone here to talk to you, Jean," and he handed her the telephone. He was about the distance from the witness box to the attorney. He heard the woman say, "I want the guns." McCowan replied, "I don't believe I should return the guns

to you, because I understand they are about to be used in a jail break," and he heard the woman reply, "So what?" (298-299) Those were the precise words. (299) People in the community who knew Mr. McCowan and knew the general reputation of Mr. McCowan at the time of the happening of the incidents in this matter, knew that Mr. McCowan's reputation for truth and honesty was excellent. (299-300) He had studied for the Bar with Mr. McCowan. An objection was sustained by the court when he was asked if he knew Mr. McCowan had passed worthless checks in the sum of $12,568 and as a result this had been a major factor in a man losing his business. (301)

GERARD VACCARO testified that he was a Los Angeles Times dealer and operated a bar-restaurant in Van Nuys at Woodley and Saticoy. (307) He had met Jean Ortiz. There was a time when Jean Ortiz told him that she and her sister had dressed as men and had performed a robbery. They had obtained some $10,000 in a robbery. Jean Ortiz had told him that her sister Joan had not given her (Jean) her share of the money obtained in robberies. (307-308) In the presence of Joan, Jean told him that they wanted the guns from Mr. McCowan, as they were to be used in an attempt to deliver Joan's husband from prison. (308) He had known Mr. McCowan since 1953; he was friendly with him; and he knew people

who knew McCowan. He knew McCowan's general reputation at or about the time of the happening of the events under inquiry here, and he knew that McCowan's general reputation in the community as to honesty and truth was very good. (309-310)

ROSEMARIE GRUENWALD testified she was a Deputy Attorney General for the State of California, in the Criminal Section; that she knew Mr. McCowan; that she had known him five years; that she knew people who knew him; and she knew McCowan's general reputation at or about the time of the occurrence of the events in 1964 for truth and honesty in the community and his reputation for those qualities was good. (312-313)

JAMES A. MALUCCI testified he had been in the painting industry in the Los Angeles area for 20 years. He knew Mr. Vaccaro; had known him for 20 years. There was a time in 1964 when he met Jean Ortiz. He was present at a conversation with Mr. Jerry Vaccaro and Mrs. Jean Ortiz when Jean Ortiz stated that she and her sister Joan had dressed as men and had staged a robbery in which they obtained approximately $10,000. (314-315)

CATHERINE McCOWAN testified that she was the wife of

the defendant. In 1964, about September or October, she went to Royal Oak Street with her husband. They obtained some articles there: two mink coats and some diamond rings. She saw the diamond rings. Exhibits 1, 2 and 3 were shown to her. They appeared to be similar in character to the rings she saw that day. (319-320) One fur coat was a long mink coat and the other was a mink stole. This house was an unoccupied house; her husband had been doing a favor for the owner and watching the grounds, keeping an eye out. These articles were taken to their home for safekeeping. The guns were taken to her father-in-law's apartment. (320-321) After being taken to her house, they were removed the next night to her father-in-law's apartment. (321-322) There was a time when there was a conversation between herself and her husband about the sale of the rings. Her husband brought home eleven $100 bills in a white envelope and the money was kept in a desk. She knew it. Her husband told her where it was. None of this money was ever spent while it was there. At the time of his arrest, Mr. McCowan gave the money to the attorney and the attorney returned it to the owner. (322-323)

GERARD VACCARO was recalled. Shortly before the

previous trial he had a conversation with Jean Ortiz and Joan Ansel or Christensen. This conversation was at the airport. There was a later conversation; a discussion between Jean Ortiz and Joan Ansel/Christensen about the division of money. Jean Ortiz stated that she had not received her fair division of the results of a robbery, or words to that effect. The conversation was recorded. He had since listened to the recording and it was accurate. He had a tape for it. He identified the tape in question; the tape was marked Exhibit B for identification. (327) This was a recording of Jean Ortiz, Joan Ansel and himself.

NICHOLAS CIPRIANO testified that he knew Michael McCowan; Michael was his stepson. Prior to the other trial, in 1964, he went with Mr. McCowan to an address on Royal Oak. There he saw a number of firearms, ammunition and a medical kit. He helped pick these items up and take them to McCowan's house. (330-331) There were side arms, .38 revolvers and derringers; there was ammunition and a medical case. He later saw the rifles. (331-332) He also saw some diamond rings. He helped Mr. McCowan take the property from his place to the witness's apartment. He took the rifles, the revolvers, the ammunition and the medical kit. (332-333) They were taken to his apartment prior to the former trial.

He looked at Exhibit A, a photograph of the rifles, hand guns and the surgical kit, and said this was a fair representation. (333)

EARL OSADCHEY testified that he was a special assistant to the District Attorney of Los Angeles County; that he knew Mr. McCowan; that he had known him since 1960; that he knew people in the community that knew Mr. McCowan; that he knew the general reputation of Mr. McCowan in the community for truth and honesty and Mr. McCowan's reputation for those qualities was good. (334-335) In response to the court he said he was a special assistant and a lawyer on the staff of the District Attorney. (335-336)

DAVID VICTOR STANTON testified he was a retired police sergeant and had been on the police department 20 years; that he knew the defendant; that McCowan worked for him as a patrolman; that he knew people in 1964 in the community who knew McCowan; that he knew McCowan's general reputation for truth and honesty in the community in 1964; and that McCowan's reputation for truth and honesty was good. In 1964 Mr. McCowan discussed with him the subject of obtaining a package from the United States mails. This was in the watch commander's office in the Van Nuys Station. (337)

With reference to getting a package out of the mails, he told McCowan to go over and talk to the postmaster and find out from him how to do it. There were times when McCowan worked for him that McCowan received special commendations. (338) Mr. McCowan had told him that he thought there were narcotics in the package. (338-339) Mr. McCowan talked to him about some diamond rings, and he directed McCowan to his father-in-law with reference to selling the diamond rings. (339)

ALICE CIPRIANO testified she was the mother of Mr. McCowan. In 1964 there was a time when some guns and diamonds were brought into her home. She looked at Exhibit A, a photograph, and said that was a fair representation of the property brought into her home. Her husband and son took an inventory of the property indicated in Exhibit A. (341-342) She had seen the diamonds and the coats previous to her husband and son going to pick up the remainder of the guns. (342-343) The property had been taken to her house in case the girls knew where her son lived and came to get it before it had cleared with the department to find out if these items had been used in robberies or murders.

JOHN E. O'GRADY testified that he was a police officer

for the City of Los Angeles, attached to Van Nuys; that he had been in the Police Department 20 years. He was then field supervisor. He had known McCowan for five and a half years. At the time of the happening of the events involved here, in 1964, he knew the general reputation in the community of McCowan for truth and honesty and McCowan's general reputation for those qualities was good. (346) There was a time in 1964 when Mr. McCowan discussed with him the sale of some diamonds; McCowan showed him the diamonds. He looked at Exhibits 1, 2 and 3, the diamond rings, and he said they appeared to be the same rings as those which McCowan had showed him. (347) He gave McCowan the name of Brooks Runyon whom he thought would be interested in buying the rings. (347)

PATRICK H. LONG testified he was a police officer for the City of Los Angeles, assigned to Van Nuys Detectives; he was a sergeant in 1964 and 1965. He knew Michael McCowan. Sometime in October or September he had a conversation with Officer McCowan in relation to a person by the name of Kenneth Christensen. (350) McCowan told him that he had met Christensen's wife, who was a student, and that she was in love with Christensen and that he felt he was in very close with her and could learn information that might

possibly lead to solving some of the crimes that Christensen was responsible for on the West Coast. McCowan also informed him that Christensen was in custody and that possibly Mr. Christensen's wife was involved in some crimes on the East Coast with Christensen. He told McCowan to stay close to her and keep his eyes and ears open and report to him what happened. McCowan reported to him that Christensen had apparently pulled a job in the East and that Christensen's wife saw him captured by the police and she had driven the car back to the West Coast. Either on this occasion or later McCowan mentioned to him that he had checked the car out - it had been sold to a dealer, and had searched the car for some weapons; that there were supposed to be quite a few guns involved. (352) He had other conversations with Mr. McCowan; he did not remember how many or what dates; the conversations were in relation to these women and Kenneth Christensen, fur coats, jewelry, and guns. McCowan told him that Christensen's wife had jewelry and furs; she had received the property as gifts from her husband. (353) McCowan on one occasion told him the girls had left the fur coats with him, and he told McCowan to give them back before he got into trouble. (354) McCowan at one time gave him an inventory of numbers on weapons or guns. McCowan told him he had taken the serial numbers from the guns. There was a time during

the period in question when Mr. McCowan brought a box to him at Van Nuys Detectives. He thought Officer Miller was present. The box was a half an inch or three quarters thick by three or four by five. (356-357) The box marked Exhibit 4 appeared similar in size. The box was wrapped or partially wrapped; the addressee was Joan Ancell (Ansel), Room 7, Colonial Manor Motel, Rockville, Maryland. (358) There was a sender's Post Office Box 2754, Van Nuys. (358-359) In the box there was an address book which had a list of 24 notations with amounts of money opposite, the smallest amount being $60 and the largest $16,500. (359-360) Also in the box there was an Armed Forces ID card in the name of Michael Y. Ancell(Ansel); there was a pilot's license, Federal Aviation Agency; temporary Airman's Certificate; a California driver's license; a previous driver's license in Texas; a USA Federal Aviation Agency medical certificate; personal ID card, printed type - all of these under the name of Michael Yosef Ancell (Ansel). There was also a card for the Airways Rent-A-Car System, an aircraft support equipment license, a Hertz Rent-A-Car charge card, Motor Insurance Corporation ID card, a Federal Communication Commission restricted radio-telephone operator's permit, a discount card for Union Furniture Company, and a small ID card for a Cad convertible. (363) After examining this material he gave it back to Mr. McCowan and told him to

send it to the addressee. (365-366) He had known McCowan for six years; knew people who knew McCowan; and knew that McCowan's general reputation in the community for truth and honesty was good. (366)

PAT KEALY testified that he was a police officer of the Los Angeles Police, a sergeant, and had been a police officer for 20 years; that he knew Mr. McCowan; that he had worked with McCowan; that he knew people in the community who knew McCowan and in 1964, at or about the time of the events here, McCowan's general reputation for truth and honesty was good. (371-372)

GEORGE E. O'NAN testified that he was a police officer of the City of Los Angeles and had been for 17 years. He had known McCowan for several years. He knew McCowan's general reputation for honesty and truth in the community in which he lived and did business, and McCowan's general reputation for those qualities was good. In 1964 Mr. McCowan showed him some diamond rings. He examined Exhibits 1, 2 and 3; he believed they were the rings. They had been shown to him in the Van Nuys Police Station. (373-374) McCowan said that he wanted to sell the rings.

## REBUTTAL WITNESSES:

STANLEY H. JENSEN testified that when he had a conversation with McCowan on January 6, 1965, he asked McCowan a question about diamond rings; McCowan did not tell him at that time that he wanted to see counsel. He had a recording which was marked Exhibit 9 for identification. (380-381)

J. P. KEOWN testified that he had authority in a case such as this to render a lie detector test. (382-383) When McCowan asked him if he (McCowan) could take a lie detector test, he told McCowan that they generally did not give a lie detector test in cases such as this where the subject had already lied to them. That was all he said.

On cross-examination he stated that Mr. McCowan offered to take a lie detector test and he (the witness) refused. (385)

## FOR THE DEFENDANT-APPELLANT:

OLIVE STARKWEATHER testified that she was an attorney. She knew Mr. McCowan. She knew people who knew McCowan. She knew McCowan's general reputation in 1964 for the qualities of truth and honesty and his general reputation for those qualities in the community was good. (413-414)

GERARD VACCARO was recalled. He identified Exhibit C, a tape recording of a conversation between himself, Jean Ortiz and Joan Ansel. He had been trying to get a statement to assist in the case. The statements were freely and voluntarily made. (415-417)

DEFENSE CLOSED.

GOVERNMENT CLOSED.

The defendant-appellant moved for a judgment of acquittal as to both counts. Under Rule 29, the court reserved its ruling on the motion. (420)

## ARGUMENT

## I

### THE COURT ERRED IN DENYING THE MOTIONS FOR JUDGMENT OF ACQUITTAL. THE EVIDENCE WAS NOT SUFFICIENT TO SUSTAIN THE TRIAL JUDGMENT ON BOTH COUNTS OR EITHER COUNT.

### ANCILLARY TO THIS, AND CONTROLLING, WE RESPECTFULLY URGE THAT THE COURT HAD NO JURISDICTION TO TRY THIS CASE. McCOWAN WAS A SENDER, AND WHEN THE PACKAGE WAS RETURNED TO HIM THE POSTAL AUTHORITIES AND THE UNITED STATES DISTRICT COURT LOST JURISDICTION TO TRY McCOWAN.

It is our contention that the package was surrendered by the postal authorities to the writer or its rightful agent; that upon such delivery, "then the authority and power over the [package] of the United States ceases and determines." (*United States v. Bullington, supra,* 170 Fed. Rptr. 121.)

> "Any delivery to the writer before its conveyance by the mail ends the authority of the government over it; and the delivery of it to the rightful agent of the writer would be the same as a delivery to the writer himself. The same rule applies, and the principle is the same, when it is delivered to the addressee or his agent."
>
> *United States v. Bullington, supra,*
> 170 Fed. Rptr. 121, 123.

We have carefully reviewed the cases, in the hope we could find something recent to help us, but without avail. We respectfully direct the Court's attention to *Bullington,*

*supra,* and to *United States v. Safford,* 66 Fed. Rptr. 942.

In the latter case, the Court said:

> "The courts all agree that such an interpretation should not be given to this statute, and this is obviously correct. Several considerations lead unerringly to such a conclusion. Congress only intended to secure the sanctity of the mail while it was in the custody of the postal department en route from the sender to the person to whom it was directed. Beyond the protection of the mail while discharging the functions of postal service with respect to it the federal government has no rightful power or legal concern. Its right to impose any penalties is an incident to its power to establish post offices and post roads, and in the discharge of this function to protect the correspondence from the depredations of its own employes, as well as the unlawful aggressions of others. It would be reprehensible to assume that congress made a pretext of this power to establish rules of good conduct and punish violations of them between a principal and agent or to promulgate police regulations independent of the postal service, and after the postal functions had been performed. Such matters are of local concern, amenable to state law. It is but just that one who, having been delegated by another to receive his mail, and, having received it, should embezzle it, should be punished; and it is likewise just that one who should steal a letter after it had been delivered, and before it came into the manual possession of the party to whom it was directed, should be punished; but we should not allow our anxiety to suppress immoralities and

punish crime to cause us to ignore the proper tribunals and proper authority for the redress of grievances of this character. So a statute, broad in its terms, will be restricted by construction to the objects which the legislature had in view, and especially will its terms be restricted within the organic authority of the enacting body. *Farnum v. Blackstone Canal Co.*, 1 Sumn. 46, Fed. Cas. No. 4,675; *Sage v. City of Brooklyn,* 89 N.Y. 189; *People v. McClave,* 99 N.Y. 83, 1.N.E. 235; *Suth. St. Const.* §§ 246, 324. Speaking with respect of the construction of this statute, Judge Betts, with whom was sitting Judge Nelson, in *U.S. v. Parsons,* 2 Blatchf. 104, 106 Fed.Cas. No. 16,000, said:

"'What, then, is the true import and force of the phrase, "shall have been in a post office or in the custody of a mail carrier," and of the phrase, "before it shall have been delivered to the person to whom it is directed"? Are they of unlimited extent, covering every condition of a letter until it reaches its rightful destination? To give the language this construction would be to continue letters which had been once in the mail under the power and control of the federal government, in every change and transfer from person to person and place to place, and without limitation of time. Legislation of such a scope and extent would clearly not be in furtherance of the functions and duties of the post-office department, but in protection of the private property of individuals after it had become detached from that department and was wholly out of the charge of its agents. Such legislation would thus necessarily take quality and form of a municipal regulation governing the relations and responsibilities of individuals to each other in respect to letters and their contents which had been in the post office, although not obtained through any act of fraud or deceit against

> the post-office laws. And congress would, in effect, be invested with the power to compel every person into whose possession a letter which had been in the post office should come to take upon himself the responsibility of carrying and delivering it to the person to whom it should be directed. We think that the object of this twenty-second section does not look beyond a possession of letters obtained wrongfully from the post office or from a letter carrier. Its design is to guard the post office and its legitimate agents in the execution of their duties in the safe-keeping and delivery of letters. After the voluntary termination of the custody of a letter by the post office or its agents, the property in and right of possession to it belong wholly to its real proprietor, and his rights are under the guardianship of the local law, and not of that of the United States.'"

*United States v. Safford, supra,*
66 Fed. Rptr. 942, 943-944,

citing:

*United States v. Parsons,*
2 Blatchf. 104, 106
Fed. Cas.No. 16,000.

See also:

*United States v. Driscoll,*
1 Lowell, 303, Fed. Cas.
No. 14,994,

cited in *United States v. Safford, supra.*

## II

## THE UNITED STATES ATTORNEY WAS GUILTY OF MISCONDUCT IN THE COURSE OF CROSS-EXAMINATION OF A CHARACTER WITNESS OF DEFENDANT-APPELLANT - SUCH AS COULD NOT BE CURED BY AN INSTRUCTION TO DISREGARD THE SAME, AS GIVEN BY THE COURT.

Mr. Ira Reiner, Deputy City Attorney of Los Angeles, testified on behalf of defendant-appellant McCowan and, among other things, stated that he knew McCowan's reputation for truth and honesty in the community in which he resided and did business and that his reputation for those qualities was excellent (R.T. p. 300). On cross-examination, the Assistant United States Attorney asked:

> "Have you heard that Mr. McCowan passed worthless checks in the sum of $12,568.00, and that as a result of this it was a major factor in a man losing his business?" (R.T. p. 301)

Objection was immediately made (R.T. p. 301). Thereupon there was discussion between court and counsel, some of it beyond the hearing of the jury, at the side bar (R.T. pp. 302-305). The court then instructed the jury to disregard the question asked by counsel (R.T. pp. 305-306):

> "THE COURT: Ladies and gentlemen of the jury, when the court makes a ruling on a matter you are not to speculate as to why the court has made the ruling, nor what might have been offered if the court had not made a

ruling.

> "In the trial of a case -- and in particular a criminal case -- the court should try to see to it that the issues are made as simple as possible so that the jury, when it has the case to decide on guilt or innocence, should be able to decide without confusion and without collateral issues. And if we get off into the trial of collateral issues it sometimes has a tendency to confuse the jury.
>
> "For that reason I am taking my prerogative at this time and not allowing the testimony which was offered. And you are to disregard the question asked by counsel, to give it no -- give it no consideration whatsoever. It is not to be considered by you in determining this case. Just try to, as near as you can, make it so that you never heard that statement. You must not consider that question and the attempted answer."

With the next witness, the Assistant United States Attorney was about to pursue the same question and asked the court if he was precluded from so doing (R.T. pp. 309-310):

> "MR. MILLER: Am I to understand that I am to be precluded from going into this area that we discussed before as to all these character witnesses they are going to put on?
>
> "THE COURT: I don't know how much plainer I could have made it. I don't know how much plainer I could have made it, if I had written it out and put it on the wall it couldn't have been plainer.

> I don't know how you could ask that question.
>
> "MR. PARSONS: I ask the court, please, to instruct the jury to disregard that.
>
> "THE COURT: All right. I was trying to divert the jury's attention away from that entirely, and the jury again is instructed to completely disregard the question and any reference to that matter, they are not to consider it at all in considering the guilt or innocence of this defendant in this case.
>
> "I made a ruling and the ruling stands, as to that witness, and as to all witnesses that are called at a later time -- no matter who they may be."

We contend that this was in violation of the rule laid down in *Vierick v. United States*, 318 U.S. 236, 248, quoting *Berger v. United States*, 295 U.S. 78, 88:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he

> is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

With all due respect to the learned trial judge, the instruction to the jury to disregard could not, and apparently did not, overcome the prejudicial effects of the question.

As was said in *Krulewitch v. United States*, 336 U.S. 440:

> " . . . The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction. (Citing cases)"

## III

## INCIDENTS WHICH DENIED DEFENDANT-APPELLANT A FAIR TRIAL, AS GUARANTEED BY THE CONSTITUTION:

### A. THE NEW INDICTMENT AFTER THE MISTRIAL, SWITCHING THE ALLEGATIONS, AND DOING SO TO ENCOMPASS THE TESTIMONY DEVELOPED IN THE FIRST TRIAL.

(See Motion to Dismiss - Clerk's Transcript.)

### B. THE QUESTION PUT TO ONE CHARACTER WITNESS AND SOUGHT TO BE PRESENTED TO THE NUMEROUS CHARACTER WITNESSES.

## C. THE QUESTIONS PUT TO THE DEFENDANT ABOUT HIS LEGAL EDUCATION.

## D. THE QUESTIONS ABOUT DEFENDANT-APPELLANT'S INTIMACY WITH THE GOVERNMENT'S FEMALE WITNESS.

### WHAT IS A FAIR TRIAL?

It has been said in a discussion of that fair trial which is guaranteed by the Constitution:

> "The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence which has for its ultimate goal the preservation and protection of the representation and freedom of the individual citizen."
>
> *Miller v. United States*, 120 F. 2d 968, 973.

# CONCLUSION

We respectfully urge that the evidence was not sufficient to sustain the trial judgment on both counts or either count and, if a crime was committed, the trial court did not have jurisdiction; that the sum total of the evidence, the errors to which we have directed the Court's attention, and the incidents which occurred, resulted in an unfair trial, such as is guaranteed by the Constitution; and that by reason thereof, the judgment should be reversed.

Respectfully submitted,

RUSSELL E. PARSONS and
RICHARD CHRISTENSEN

BY RUSSELL E. PARSONS

Attorneys for Appellant

# CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

DATED: October 11, 1966, at Los Angeles, California.

RUSSELL E. PARSONS
Signature of Counsel

## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA )
) ss.
County of Los Angeles )

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on October , 1966, I served the within APPELLANT'S OPENING BRIEF (United States v. McCowan - No. 20917) on the following named party by depositing three copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October , 1966, at Los Angeles, California.

D. A. Standefer

Orig & 20 copies:
Clerk, U.S.Court of Appeals for the Ninth Circuit
U. S. Post Office and Court House Bldg.
San Francisco, California 94101
1 copy:
Honorable Charles H. Carr
U. S. District Court, Southern District of Calif.,
Central Division, Los Angeles, California

Subscribed and sworn to before me

this day of October , 1966.

Notary Public in and for
the State of California.